In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 494

SADIE HAINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. Prior to July 11, 1959, petitioner, a veterans-preference eligible, was a career employee in the Immigration and Naturalization Service (Pet. 2). On June 26, 1959, she tendered her resignation from the Service, effective as of July 11, 1959, but then attempted to withdraw it three days later, on June 29 (Pet. 2). The Service declined to accept the withdrawal, and accordingly terminated petitioner's employment on July 11, 1959 (Pet. 2). On July 22, 1959, the Civil Service Commission denied petitioner's request for review of that termination on the ground that the Service was entitled to refuse to give effect to petitioner's withdrawal of her unsolicited resignation (Pet. 2–3).

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In May 1960, after the Commission rejected petitioner's request to reopen, she commenced an action in the United States District Court for the Southern District of New York against the Director of the Second United States Civil Service Region for the purpose of obtaining a declaratory judgment that she had been, in effect, discharged from her employment and was therefore entitled to a Civil Service Commission hearing under Section 14 of the Veterans Preference Act, as amended, 5 U.S.C. 863 (Pet. 3). Her action was dismissed by the district court on the ground that she had failed to join the Civil Service Commissioners—who are indispensible parties—as defendants. *Haine* v. *Googe,* 188 F. Supp. 627; see *Blackmar* v. *Guerre,* 342 U.S. 512. The Court of Appeals for the Second Circuit affirmed in May 1961. *Haine* v. *Googe,* 289 F. 2d 931 (C.A. 2) (Pet. 3).

More than two years later, in October 1963, petitioner commenced a second such action in the district court, this time against the Director and the Civil Service Commissioners.[1] That action is presently pending in the district court, awaiting trial on the issue of her laches. See *Haine* v. *Googe,* 248 F. Supp. 349 (S.D.N.Y.) (Pet. 3–4).

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[1] Section 1 of Pub. L. 87–748, 76 Stat. 744, enacted in October 1962, 28 U.S.C. 1361, vests in the district courts "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Section 2 of that statute, 28 U.S.C. 1391(e), permits suits against federal officials in the judicial district in which the plaintiff resides.

On July 9, 1965, almost six years after the termination of her employment, petitioner commenced the present action in the Court of Claims seeking approximately $40,000 in damages for loss of pay. Her petition in the Court of Claims alleged, as had her complaint in the second district court action, that "such termination was without the consent and against the wishes of the plaintiff." The United States moved to dismiss on the ground (among others) that petitioner's action was barred by her laches. Petitioner filed an answer to the United States' motion in which she stated, among other things, that after the court of appeals' May 1961 decision "plaintiff and her attorney rested," and that she had failed to commence an action in the Court of Claims after that date because of her counsel's advice that "she could take her time—that she had six years from July 11, 1959, in which to sue for money." The Court of Claims ruled "that [petitioner's] alleged claim is barred under the doctrine of laches" and dismissed her action (Pet. App. 15).

2. Petitioner argues that the Court of Claims erred in dismissing her action for laches, since she had pursued her administrative and judicial remedies and the United States did not demonstrate any specific prejudice to it by reason of her delay (Pet. 7). However, it is well settled that a federal employee who claims that he has been separated unlawfully from his position must "promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service

may be disturbed as little as possible and that two salaries shall not be paid for a single service." *United States ex rel. Arant* v. *Lane,* 249 U.S. 367, 372. Petitioner delayed commencing the instant action for back pay for almost six years, and, as this Court noted in *Arant, supra,* "[s]uch a long delay must necessarily result in changes in the branch of the service to which [she] was attached and in such an accumulation of unearned salary that, when unexplained, the manifest inequity which would result from reinstating [her] renders the application of the doctrine of laches to [her] case peculiarly appropriate in the interests of justice and sound public policy." *Ibid.*

Pursuant to this Court's ruling in *Arant* v. *Lane, supra,* this Court and the lower federal courts have consistently ruled that a government employee's long, unexplained delay in instituting suit in the district court or in the Court of Claims creates a presumption that the United States was harmed by the delay, both in disruption to the civil service and in having to pay two salaries; and that such delay constitutes sufficient ground for barring the action for laches. See *e.g., Nicholas* v. *United States,* 257 U.S. 71; *Benson* v. *Zahner,* 289 F 2d 756 (C.A.D.C.), certiorari denied, 366 U.S. 904; *Bovard* v. *United States,* 160 Ct. Cl. 619, certiorari denied, 374 U.S. 830; *Chiriaco* v. *United States,* 339 F. 2d 588 (C.A. 5). Since petitioner made no attempt to show that she had a legally sufficient reason for her delay of nearly six years in instituting her action, the presumption of harm

was not rebutted and a finding of laches was clearly proper.[2]

It is therefore respectfully submitted that the petition for certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

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[2] We point out also that dismissal of the present action does not constitute a final determination of petitioner's claim against the government since she still has pending a suit in the district court in which she may be able to obtain complete relief. See *Haine* v. *Googe*, 248 F. Supp. 349 (S.D.N.Y.); 5 U.S.C. 652 (b)(2); Back Pay Act of 1966, Pub. L. 89-380, 80 Stat. 94. The only issue remaining in that suit is laches, and since that action was commenced almost three years prior to her Court of Claims suit, the period of delay is shorter and she may be able to persuade the district court that she was not guilty of laches.

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